

FEDERAL ELECTION COMMISSION

11 CFR Part 7

[Notice 1986-9]

Standards of Conduct for Agency Employees

AGENCY: Federal Election Commission.

ACTION: Final rule.

SUMMARY: The Commission has adopted regulations setting forth Standards of Conduct governing the conduct of Commissioners, employees, special Commission employees, and former employees. This new part implements the Ethics in Government Act of 1978 (Pub. L. 95-521) and other laws and regulations dealing with Federal employee standards of conduct. These regulations seek to facilitate the proper performance of Commission business and to encourage citizen confidence in the impartiality and integrity of the Commission.

Specifically, this part sets forth regulations pertaining to the acceptance of gifts, entertainment, and favors; outside employment; teaching, lecturing, and writing; business and financial interests; political and other outside activities; and the use of Government information and property. In addition, the rules provide procedures for enforcing the post-employment restrictions of the Ethics in Government Act of 1978. These regulations also provide for an Ethics Officer for the Commission whose duties include the investigation of suspected violations of this Part and the maintenance of an interpretation and advisory service to answer questions concerning conflicts of interest and other matters covered by this Part.

The regulations incorporate the Commission's current *Code of Ethics* with the exception of Section D of the *Code*. In addition, they generally follow similar provisions contained in Executive Order 11222, 30 FR 6466, at 5 CFR 735.101 through 735.306, and at § 737.27. Executive Order 11222, issued on May 21, 1965, prescribes standards of ethical conduct for Executive agency personnel. 5 CFR 735.101 through 735.306 contain regulations promulgated by the Office of Government Ethics as model standards of responsibility and conduct for Executive agency employees and

special employees, pursuant to Executive Order 11222 and to the Ethics in Government Act. 5 CFR 737.27 provides procedures for administrative enforcement proceedings concerning violations of the post employment conflict of interest restrictions contained in 18 U.S.C. 207.

EFFECTIVE DATE: October 29, 1986.

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SUPPLEMENTARY INFORMATION: On October 21, 1985, the Commission published a Notice of Proposed Rulemaking regarding its proposal to adopt formally regulations setting forth Standards of Conduct governing the conduct of Commissioners, employees, special Commission employees, and former employees. One comment, from the Office of Government Ethics (OGE), was received.

Having considered the comment received, the Commission is now publishing the final rules, together with a statement explaining their basis and purpose in accordance with the Administrative Procedure Act, 5 U.S.C. 553(c). The final rules reflect several clarifying changes from the draft rules.

In its comments OGE urged the Commission to establish a regulatory system for reviewing public financial disclosure reports filed by Commission members and personnel for potential conflicts of interest. The Commission construed this suggestion as one calling for an ongoing review system. Nothing in the model ethics regulations prescribed by OGE addresses this issue. The Commission could find no other agencies which have a written regulatory review procedure for these reports. Because the actual number of reports submitted within the Commission is less than one dozen, the informal review process now being used has been found to be responsive to the goal of maintaining high ethical standards. When conflicts arise, recusal by the interested parties remedies them. Therefore, the Commission will continue to handle such matters as it has in the past.

The Commission has also decided not to include in these rules provisions concerning the filing of confidential statements of financial interests by employees below the GS-16 level pursuant to the Ethics in Government Act as amended, pending OGE development of concrete guidelines as to the extent, shape and form of such confidential financial statements and/or

the publication by OGE of model regulations in this regard.

OGE's final comment on the Commission's proposed regulations was that the Commission had failed to confer with that Office prior to publication. During its consideration of the Notice of Proposed Rulemaking, the Commission considered whether it should submit the proposed rules to OGE prior to publication. Since there is no legal requirement that the Commission comply with such a request, the Commission did not do so. Moreover, the notice procedure granted OGE adequate opportunity to review and comment on the proposed regulations. Therefore, any failure to submit the regulations to OGE prior to publication does not provide a basis for challenging the validity of the regulations.

Basis and Purpose of the Regulations Governing Standards of Conduct, 11 CFR Part 7

Subpart A—General Provisions

Subpart A sets forth general provisions applicable to all employees of the Commission regarding rules of conduct. It also explains the process by which employees, special Commission employees, and new employees are to be notified of these standards of conduct, sets up an interpretation and advisory service provided by the Ethics Officer, and specifies the procedures for reporting and handling suspected violations of this Part and the possible disciplinary and remedial action which can be taken against violators.

Section 7.1 Purpose and applicability.

The first two sentences of section 7.1(a) are taken from the preamble to the Commission's *Code of Ethics*. The remainder summarizes the substance of Part 7, relating the importance of the prescribed ethical standards to the Commission's administration of federal election law. Paragraphs 7.1(b) and (c) make clear that the provisions of Part 7 apply to employees and special Commission employees, cross-reference Executive Order 11222 and 5 CFR Part 735, and state that Part 7 is to be construed as being in accord with any applicable laws, regulations and labor-management agreement between the Commission and a labor organization. The language of § 7.1(b) has been modified since publication of the Notice of Proposed Rulemaking by the substitution of "employee" for "regular employee" and "special Commission employee" for "special Government employee", thereby bringing this paragraph into conformity with the definitional language at § 7.2.

Section 7.2 Definitions.

The definitions at § 7.2 (b), (c), (g), and (h) follow from the Commission's *Code of Ethics*, Subpart A section 2 (a), (b), and (d), and Subpart B section 2(a). The definition of "Designated Agency Ethics Officer" or "Ethics Officer" at § 7.2(d) follows 5 CFR 734.105(d). The definition of "employee" at § 7.2(e) is based on both the *Code of Ethics*, Subpart A section 2(c), and on 5 CFR 735.102(b). At § 7.2(f), the definition of "former employee" is derived from the policy governing post employment activities adopted by the Commission on February 8, 1980, and from 5 CFR 737.3(a)(4). The definition of "person" at § 7.2(i) is based in part on the *Code of Ethics*, Subpart A section 2(e), and on 5 CFR 735.102(d). Since the Notice of Proposed Rulemaking, the Commission has added "political committee" to the definition of "person" in accordance with the definition of "person" contained in the Federal Election Campaign Act of 1971, as amended. See 2 U.S.C. 431(11). "Special Commission employee" is defined at § 7.2(j) in accordance with the *Code of Ethics*, Subpart A section 2(f), and 5 CFR 735.102(e).

Section 7.3 Notification to employees and special Commission employees.

Paragraph 7.3(a) sets out the intention of the Commission to inform each Commission employee and special employee of the provisions of Part 7. This paragraph follows 5 CFR 735.104(b) (2) and (4).

Paragraph 7.3(b) provides that the Commission will inform each new Commission employee and special Commission employee of the provisions of Part 7 at the time of entrance of duty. It is based on 5 CFR 735.104(b)(3).

Section 7.4 Interpretation and advisory service.

This section identifies the General Counsel, who serves as the Commission's Ethics Officer, as the proper source of advice and guidance for both Commissioners and employees on questions arising under Part 7. Commissioners have been added to those covered by this provision since publication of the Notice of Proposed Rulemaking. This section is based on 5 CFR 735.105(b) and the Commission's *Code of Ethics*, Subpart D section 4.

Section 7.5 Reporting suspected violations.

Paragraph 7.5(a) establishes the procedure for reporting a suspected violation of Part 7. Any suspected violation is to be reported to the Ethics Officer in writing. This paragraph

follows the Commission's *Code of Ethics*, Subpart D section 3, except that the Ethics Officer replaces the Staff Director as the recipient of reports. This paragraph is also based in part on 5 CFR 735.106(b).

Paragraph 7.5(b) provides employees with an opportunity to explain a conflict of interest, or the appearance thereof, in writing. This paragraph is based in part on 5 CFR 735.106(c). The references to "Subpart D of this Part" and to "information from other sources" contained in the Notice of Proposed Rulemaking have been deleted as a result of the Commission's decision not to prescribe rules pertaining to public financial disclosure reports until such time as the Office of Government Ethics publishes model regulations on confidential financial disclosure. "Information available to the Commission" has been added as clarifying language.

Section 7.6 Disciplinary and other remedial action.

Paragraph 7.6(a) asserts the Commission's authority to take appropriate disciplinary action, in addition to any penalty prescribed by law, in the event of violation of this Part by an employee or special Commission employee. This paragraph is based in part on 5 CFR 735.107(a) and on the *Code of Ethics*, Subpart D section 1(a).

Paragraph 7.6(b) establishes procedures to be followed after a determination by the Ethics Officer that an employee may have, or appears to have, a conflict of interest, and delineates the supervisory personnel who are to be involved in this process. The employee's supervisor and division head are included as persons with the most direct knowledge of the employee and his or her work. Since publication of the Notice of Proposed Rulemaking, the Staff Director has been added to the supervisors to be involved in disciplinary and other remedial actions for those employees outside the Office of General Counsel. This paragraph is based in part on the *Code of Ethics*, Subpart D section 1(a) and on 5 CFR 735.106 (b) and (c).

Paragraph 7.6(c) outlines possible forms of remedial action which the Commission may take in situations of conflicts of interest. This paragraph is based on the *Code of Ethics*, Subpart D section 1(b), and 5 CFR 735.107(b).

Subpart B—Conduct and Responsibilities of Employees and Commissioners.

Subpart B establishes standards of conduct and responsibilities for

Commissioners and employees. It offers general rules regarding Commissioner and employee conduct and lists categories of unacceptable activities. Procedures for submission of outside employment requests by employees are also included.

Section 7.7 Prohibited conduct—general.

Paragraph 7.7 sets forth general proscriptions on certain categories of Commissioner and employee actions. This paragraph follows 5 CFR 735.201(a).

Section 7.8 Gifts, entertainment and favors.

Paragraph 7.8(a) prohibits a Commissioner or employee from soliciting or accepting, directly or indirectly, anything of monetary value from particular categories of persons. This paragraph is based on the *Code of Ethics*, Subpart B section 1(a), and on 5 CFR 375.202(a).

Paragraph 7.8(b) sets out exceptions to the prohibitions established at § 7.8(a). It generally follows the *Code of Ethics*, Subpart B section 1(b), and 5 CFR 735.202(b).

Paragraph 7.8(c) prohibits, with certain exceptions, solicitation of contributions by a Commissioner or employee of another employee for a gift to someone in a superior position, the making of a donation as a gift to an official superior or the acceptance of such a gift from someone receiving less pay than the recipient. This paragraph is based on the *Code of Ethics*, Subpart B section 1(c) and on 5 CFR 735.202(d).

Since publication of the Notice of Proposed Rulemaking, "a Commissioner" has been added to those who are prohibited by § 7.8(d) from accepting things of value from a foreign government. This provision is based on 5 CFR 735.202(e).

Paragraph 7.8(e) concerns acceptance of reimbursements from other than Commission funds for travel expenses incurred on official business by Commissioners or employees. It cites Decision B-128527 of the Comptroller General dated March 7, 1967, (46 Comp. Gen. 669), interpreting 18 U.S.C. 209 which provides that a Federal employee may be compensated for his or her official duties only by the United States Government. See also 36 Comp. Gen. 288 (1956). According to Decision B-128527, an agency without statutory authority to accept gifts may not accept reimbursement by a private source for an officer's or an employee's travel, subsistence, or other expenses because such reimbursement would constitute augmentation of appropriations. The Commission does not have such

statutory gift acceptance authority. 18 U.S.C. 209 does contain exceptions to this general rule; the exceptions relevant to the Commission permit acceptance of compensation from a state or local government, and the acceptance of traveling expenses from certain tax exempt organizations under the Government Employees Training Act (5 U.S.C. 4111).

Since publication of the Notice of Proposed Rulemaking, "a Commissioner" has been added to those covered by § 7.8(e). This provision is based on 5 CFR 735.202(f).

Section 7.9 Outside employment or activities.

Paragraph 7.9(a) prohibits a Commissioner from devoting a substantial portion of his or her time to any other business, vocation or employment. It is based on 2 U.S.C. 437c(a)(3) and in part on the *Code of Ethics*, Subpart B section 2(a). The *Code* incorporates language contained in the Conference Report on the 1976 amendments to the Federal Election Campaign Act. Commenting on 2 U.S.C. 437c(a)(3) which states that "... members of the Commission shall not engage in any other business, vocation, or employment", the Conference Report found that "... the requirement is intended to apply to members who devote a *substantial* portion of their time to such business, vocation, or employment activities. The conferees, however, do not intend the requirement to apply to the operation of a farm, for example, if a *substantial* portion of time is not devoted to such operation." H.R. Rep. No. 94-1057, 94th Cong. 2d Sess. 34 (1976) (emphasis added).

Paragraph 7.9(b) prohibits an employee from engaging in outside employment that is not compatible with his or her Government employment and not in compliance with any labor-management agreement between the Commission and a labor organization. This paragraph differs from its counterpart in the Notice of Proposed Rulemaking in that its language has been broadened to cover any labor-management agreement between the Commission and a labor organization rather than a specific agreement entered into with a particular labor organization. Paragraphs 7.9(b) (1)-(10) provide examples of the types of outside employment which are deemed incompatible with employment by the Commission. This listing is not all inclusive. These paragraphs are based in part on 5 CFR 735.203(a), and on the *Code of Ethics*, Subpart B section 2(b) (1) and (2), and (c).

Paragraph 7.9(c) is based on 5 CFR 735.203(b). (See also discussion of Paragraph 7.8(e).)

Paragraph 7.9(d) establishes parameters regarding the information which employees may use when engaging in lawful teaching, lecturing and writing in either a paid or voluntary capacity. It is based in part on the *Code of Ethics*, Subpart B section 2(b)(2)(A), and on 5 CFR 735.203(c).

Paragraph 7.9(e) is based on the *Code of Ethics*, Subpart B section 2(b)(2)(B) and on 5 CFR 735.203(e).

Paragraph 7.9(f) contains the requirement that an employee wishing to engage in outside employment obtain prior approval. In the case of employees of the Office of General Counsel, such approval must come from the General Counsel/Ethics Officer, while all other employees must first obtain the approval of the Staff Director and then that of the Ethics Officer. The language of this paragraph has been altered from that of the Notice of Proposed Rulemaking in order to clarify that an employee of the Office of General Counsel must obtain approval from the General Counsel who also serves as the Ethics Officer, i.e., approval is to be obtained from one individual acting in two separate capacities. Paragraph 7.9(f) also outlines the information to be supplied when making a written request for permission to engage in outside employment, provides that the employee will receive a response approving or disapproving his or her written request pursuant to the provisions of any labor-management agreement in effect between the Commission and a labor organization, and states that a record of the approval is to be placed in the employee's official personnel folder. The language regarding any labor-management agreement differs from that contained in the Notice of Proposed Rulemaking in its applicability to any such agreement rather than to a specific agreement with a particular labor organization. This paragraph is based primarily on the *Code of Ethics*, Subpart B section 2(b)(1).

Section 7.10 Financial interests.

This section establishes parameters for financial transactions and interests in which Commissioners and employees may engage, and provides for full disclosure and for self-disqualification from proceedings and decision-making where a financial interest is, appears to be, or could be affected.

Paragraph 7.10(a)(1) is based on 5 CFR 735.204(a)(2) and the *Code of Ethics*, Subpart B section 3(a).

Paragraph 7.10(a)(2) is based on 5 CFR 735.204(a)(1), and on the *Code of Ethics*, Subpart B, section 3(b). The language concerning full disclosure and disqualification contained in the Notice of Proposed Rulemaking has been revised to include Commissioners among those covered by this provision. For Commissioners and others required to file public financial disclosure reports pursuant to the Ethics in Government Act, "full disclosure" will be deemed to have been met by the filing of those reports. Employees not required to file public financial disclosure reports must submit a written statement to the Ethics Officer disclosing any particular financial interest which creates, or appears to create, a conflict of interest. Such a procedure will be necessary until such time as the Commission promulgates rules, following publication of model regulations by the Office of Government Ethics, regarding which employees are to file confidential financial disclosure reports and what those reports are to contain.

Paragraph 7.10(a)(3) is based on the *Code of Ethics*, Subpart B section 3(c).

Paragraph 7.10(b) follows 5 CFR 735.204(b).

Section 7.11 Political and organization activity.

This section, as noted at § 7.11(a), contains special restrictions on political activities imposed upon Commissioners and Commission employees. These restrictions are in addition to those imposed by the Hatch Act, 5 U.S.C. 7324, *et seq.*, and arise out of the Commission's special role in the political process.

Under paragraph 7.11(a)(1), Commissioners and employees should neither publicly support nor work for a candidate, political party, or political committee within the Commission's jurisdiction; moreover, the paragraph states that contributing to a candidate, party or committee subject to the Commission's jurisdiction is likely to result in a conflict of interest. This paragraph is based in part on the *Code of Ethics*, Subpart B, section 8(a)(1). The final sentence in section 8(a)(1) of the *Code* has been deleted as redundant.

Paragraph 7.11(a)(2) is based on the *Code of Ethics*, Subpart B section 6(a)(2).

Paragraph 7.11(b) follows the *Code of Ethics*, Subpart B section 6(b).

Paragraph 7.11(c) generally follows the *Code of Ethics*, Subpart B section 6(c).

Paragraph 7.11(d) is designed to prevent circumvention of the restrictions of this section through third parties by making an employee accountable for the

political activities of another person acting as the employee's agent or under his or her direction. This paragraph is based on the *Code of Ethics*, Subpart B section 6(d).

Section 7.12 Membership in associations.

Although Commissioners and employees are not prohibited from becoming members of non-governmental associations or organizations, this section provides that they must avoid activities on behalf of such associations or organizations which are incompatible with their official Commission positions. This section is based on the *Code of Ethics*, Subpart D section 2.

Section 7.13 Use of Government property.

This section is based on the *Code of Ethics*, Subpart B section 4, and on 5 CFR 735.205.

Section 7.14 Prohibition against making complaints and investigations public.

This section warns Commission employees of the provisions of 2 U.S.C. 437g(a)(12) (A) and (B) which prohibit making public any notification or investigation of an enforcement matter before the Commission without the written consent of the person complained against or being investigated. The statute provides for monetary penalties to be levied against any Commissioner, employee or other person who breaches this requirement of confidentiality. This section is based on the *Code of Ethics*, Subpart B section 7, although the final line of the latter provision has been deleted as unclear.

Section 7.15 Ex parte communications.

The purpose of this section is to avoid any real or apparent prejudice to the public interest in enforcement actions before the Commission. This provision is intended to govern the internal procedures of the Commission; thus, it differs in emphasis, although not in effect, from the prohibition on ex parte communications at 11 CFR 111.22, which is directed at persons outside the Commission as well as at Commissioners and employees. Paragraph § 7.15(a) is based upon the *Code of Ethics*, Subpart B section 8(a), except that the prohibitions in the *Code* directed at persons outside the Commission have been deleted as outside the scope of these regulations.

Paragraph 7.15(b) establishes the time frame during which the prohibition against ex parte communications established by this section is in effect. It

follows the *Code of Ethics*, Subpart B section 8(b).

Paragraph 7.15(c) requires that any written communication prohibited by § 7.15(a) be delivered to the Ethics Officer who is required to place it in the file of the enforcement matter involved. This paragraph is based on the *Code of Ethics*, Subpart B section 8(c), except that the reference to "Staff Director" in the *Code* has been changed to "Ethics Officer".

Paragraph 7.15(d) outlines the responsibilities of Commissioners and employees who are the targets of ex parte communications. This paragraph is based on the *Code of Ethics*, Subpart B section 8(d).

The Commission received no responses to its question in the Notice of Proposed Rulemaking as to whether it should propose regulations governing ex parte communications in areas of its operations other than enforcement, e.g., with regard to advisory opinions and proposed regulations. Therefore, no such additional regulations are being prescribed at this time.

Section 7.16 Miscellaneous statutory provisions.

This section draws the attention of the employee to a series of statutory provisions which relate to his or her conduct as an employee. These statutory provisions are listed in the *Code of Ethics*, Subpart B section 10(a) through 10(o), and at 5 CFR 735.210(b) through 210(q), and are also reflected in Subpart D of this Part.

Subpart C—Conduct and responsibilities of special Commission employees.

This Subpart pertains to the conduct of special Commission employees as defined at section 7.2(j). The regulations include prohibitions on the misuse of Commission employment or inside information for unlawful private gain, and on the unlawful acceptance of gifts and gratuities from persons having business with the Commission.

Section 7.17 Use of Commission employment.

This section follows the *Code of Ethics*, Subpart C section 1, and 5 CFR 735.302.

Section 7.18 Use of inside information.

Paragraph 7.18(a) is based on the *Code of Ethics*, Subpart C section 2(a), and on 5 CFR 735.303(a).

Paragraph 7.18(b) brings special Commission employees within the provisions of § 7.9 (d) and (e) as regards teaching, lecturing or writing. It is based

on the *Code of Ethics*, Subpart C section 2(b), and on 5 CFR 735.303(b).

Section 7.19 Coercion.

This section is based on the *Code of Ethics*, Subpart C section 3, and on 5 CFR 735.304.

Section 7.20 Gifts, entertainment, and favors.

This section prohibits special Commission employees from receiving or soliciting anything of value from a person having business with the Commission while the special employee is so employed or in connection with that employment. The exceptions to this general prohibition are the same as those granted Commission employees at Subpart B, section 7.8(b). This section is based on the *Code of Ethics*, Subpart C section 4(a), and on 5 CFR 735.305(a).

Section 7.21 Miscellaneous statutory provisions.

Special Commission employees are required by this section to acquaint themselves with each statute related to their ethical or other conduct as a special employee, with particular emphasis upon the statutory provisions listed at § 7.16. This section is based on the *Code of Ethics*, Subpart C section 5, and on 5 CFR 735.306.

Subpart D—Post Employment Conflict of Interest: Procedures for Administrative Enforcement Proceedings.

This Subpart contains procedures for investigating and administratively correcting post employment conflicts of interest. These procedures are generally the same as those approved by the Commission on February 8, 1980, pursuant to 18 U.S.C. 207(j) and 5 CFR 737.1 (see Commission Memorandum #759 dated February 4, 1980), which were found by OGE to conform to the model procedures prescribed by that Office at 5 CFR 737.27

Section 7.22 Scope.

This section states that the procedures set out in this Subpart are to be used in correcting violations of the post employment conflict of interest provisions of 18 U.S.C. 207 (a), (b), and (c). The present language of the section clarifies that former special Commission employees are covered by this provision. The section has also been augmented by language which states that for purposes of Subpart D "former special Commission employee" is to be defined in accordance with 18 U.S.C. 207(c)(1). In addition, the final rule eliminates partners of former employees as persons whose activities are

restricted by 18 U.S.C. 207. The provisions of section 207 extend only to the partners of present employees, not to those of former employees or former special employees. See 18 U.S.C. 207(g).

Section 7.23 Initiation of Investigation.

Paragraph 7.23(a)(1) provides for the filing of a complaint with the Ethics Officer of the Commission by anyone who believes that a former employee has violated the post employment conflict of interest provisions of 18 U.S.C. 207 (a), (b), or (c), or of 5 CFR 737.

Paragraph 7.23(a)(2) provides for the notification by certified mail of the former employee named in a complaint and for the submission by that former employee of a written legal or factual response within ten days after his or her receipt of the complaint.

Paragraph 7.23(b)(1) places responsibility upon the Ethics Officer for reviewing the complaint and any response by the former employee, and for preparing a report to the Commission in which he or she recommends either that the Commission open an investigation of the allegations in the complaint or that the Commission dismiss the complaint on its face.

Paragraph 7.23(b)(2) asserts the authority of the Commission to order an investigation of allegations made in a complaint by an affirmative vote of four of its members. This paragraph is based in part on 5 CFR 737.27(a)(2)(ii).

Paragraph 7.23(b)(2)(i) requires that any investigation conducted under this section be kept confidential pending a Commission finding of reasonable cause to believe a violation has occurred. The exception to this prohibition pertains to coordination with the Department of Justice following notification as required by § 7.23(b)(2)(ii). This paragraph is based on 5 CFR 737.27(a)(2) (i) and (ii).

Paragraph 7.23(b)(2)(ii) requires that the Commission's Ethics Officer notify the Director of the Office of Government Ethics and the Criminal Division of the Department of Justice that the Commission has ordered an investigation of the allegations made in the complaint pursuant to § 7.23(b)(2), and specifies the information that must be included with the notification. This paragraph is based on 5 CFR 737.27(a)(2)(i).

According to § 7.23(b)(2)(ii) the Commission is to coordinate its investigation or administrative action with the Department of Justice if criminal proceedings are being considered or pursued. This paragraph is based on 5 CFR 737.27(a)(i).

Paragraph 7.23(b)(3) states that there will be no investigation if the Commission finds the complaint to be

unfounded. In such an event, the Ethics Officer is required to notify both the complainant and the former employee of the Commission's finding.

Section 7.24 Conduct of preliminary investigation.

Paragraph 7.24(a) establishes the responsibility of the Ethics Officer to conduct an investigation into the allegations of a complaint once the Commission has found, pursuant to § 7.23(b)(2), that the complaint appears to be substantiated.

Paragraph 7.24(b) establishes the rights of the former employee to be notified of the Commission's decision to initiate an investigation through receipt of a copy of the report submitted by the Ethics Officer Pursuant to § 7.23(b)(1), and to respond to the allegations and to the report. The Commission must receive the former employee's response within 20 days after his or her receipt of the Ethics Officer's report, although an extension of time may be requested of the Ethics Officer in writing. The language of this paragraph differs from that in the Notice of Proposed Rulemaking by the deletion of "the complaint" as one of the documents the receipt of which triggers a twenty-day response time. Section 7.23(a)(2) already provides a former employee with ten days to submit an initial response after his or her receipt of a copy of the complaint. The twenty days provided at § 7.24(b) for response to the Ethics Officer's report is in addition to the earlier ten-day response period.

Paragraph 7.24(c) provides for the former employee's representation by counsel.

When the investigation is completed, the Ethics Officer is required by Paragraph 7.24(d) to prepare a report to the Commission which is to include any materials provided by the former employee. The report must recommend a finding of reasonable cause to believe or of no reasonable cause to believe that the former employee has violated 18 U.S.C. 207 (a), (b), or (c).

Section 7.25 Initiation of administrative disciplinary proceedings.

Paragraph 7.25(a) provides for review by the Commission in Executive Session of the Ethics Officer's investigative report prepared pursuant to § 7.24(d).

Paragraph 7.25(b) provides that after the Commission, by an affirmative vote of four of its members, determines that there is reasonable cause to believe a violation has occurred, the Commission must initiate an administrative disciplinary proceeding by notifying the former employee pursuant to section

7.26. This paragraph is based on 5 CFR § 737.27(a)(2).

Should the Commission find no reasonable cause to believe a violation has occurred, Paragraph 7.25(c) requires that the file in the matter be closed and no further action be taken. The Director of the Office of Government Ethics, the Criminal Division of the Department of Justice, the complainant, and the former employee are to be notified of this determination and each is to be provided with a statement of reasons.

Section 7.26 Notice to former employee.

If the Commission finds reasonable cause to believe that a violation has occurred, the Ethics Officer is required by § 7.26(a) to provide the former employee with adequate notice of the Commission's intention to institute a disciplinary proceeding and of the employee's opportunity to request a hearing. This paragraph is based in part on 5 CFR 737.27(a)(3).

Paragraph 7.26(b) outlines the contents of the adequate notice required by § 7.26(a). It is based in part on 5 CFR 737.27(a)(3)(ii).

Paragraph 7.26(c)(1) gives a former employee who is sent a notice pursuant to § 7.26(a) ten days after receipt of that notice to notify the Commission by certified mail of his or her desire for a hearing. It also sets out the information which should be included in such a request for a hearing.

Paragraph 7.26(c)(2) provides that if a written request for a hearing from the former employee is not received within the period of time established by § 7.26(c)(1), the right to a hearing will be waived, and the hearing examiner appointed pursuant to § 7.27 (a) and (b) shall consider the written evidence and make a decision.

Section 7.27 Hearing examiner designation and qualifications.

Paragraph 7.27(a) differs from its counterpart in the Notice of Proposed Rulemaking by the deletion of the first sentence in the latter as redundant. It also modifies the language concerning the designation of a hearing examiner to clarify that, following a Commission determination that there is reasonable cause to believe a violation has occurred pursuant to § 7.25, the Ethics Officer shall designate an individual to serve as hearing examiner whether or not the former employee requests a hearing and whether or not the Commission decides to agree to such a request. If there is no hearing, the examiner will make a determination based upon the written evidence before him or her. If there is a hearing, the

examiner also will consider the oral evidence presented. See also § 7.26(c)(2). This paragraph is based in part on 5 CFR 737.27(a)(4)(i).

Paragraph 7.27(b)(1) establishes criteria to be applied in selecting a hearing examiner pursuant to § 7.27(a). It is based in part on 5 CFR 737.27(a)(4)(ii) and (iii).

Paragraph 7.27(b)(2) requires that the hearing examiner be an attorney at the Assistant General Counsel level or higher.

Section 7.28 Hearing date.

Paragraph 7.28(a) requires that the hearing examiner set the hearing at a reasonable date, time and place. It is based on 5 CFR 737.27(a)(5)(i).

Paragraph 7.28(b) requires that, whenever possible, the hearing examiner consider the former employee's needs when setting the date, time and place of the hearing. This paragraph is based in part on 5 CFR 737.27(a)(5)(ii).

Section 7.29 Hearing rights of former employees.

This section lists particular rights which are afforded former employees during a hearing conducted pursuant to Subpart D. It is based on 5 CFR 737.27(a)(6).

Section 7.30 Hearing procedures.

This section establishes the rules of procedure to be followed prior to and during an administrative disciplinary hearing held under this Subpart.

Pursuant to Paragraph 7.30(a)(1), the Ethics Officer must provide the former employee, no later than 10 days before the hearing, with a list of witnesses to be introduced by the Commission. This paragraph specifies the information to be included in this list. It also provides that the former employee must be informed if no witnesses are to be called by the Commission.

Paragraph 7.30(a)(2) sets out the responsibilities of the former employee regarding the provision of a list of witnesses he or she intends to introduce. This list must be provided to the Ethics Officer no later than 5 days prior to the hearing. The Ethics Officer is to be notified if no witnesses are to be called.

According to § 7.30(b) the Commission is to be represented at the hearing by the Ethics Officer. This subsection also reiterates the former employee's right of self-representation or to representation by counsel.

Pursuant to Paragraph 7.30(c), the burden of proof is on the Commission to establish substantial evidence of a violation. This paragraph is based on 5 CFR 737.27(a)(7).

Paragraph 7.30(d)(1) specifies the documents which the Commission is required or permitted to introduce and which will be made part of the hearing record.

Paragraph 7.30(d)(2) provides the former employee with the opportunity to submit a brief or memorandum of law to be included in the hearing record.

Paragraphs 7.30(d)(3) and (4) establish the order of the introduction of witnesses and evidence, with the Commission making the initial presentation, and also establish the right of cross-examination for both the Commission and the former employee.

Paragraph 7.30(d)(5) establishes the right to oral argument for both parties, with the Commission making the first presentation. The Commission is also given the right of rebuttal.

Paragraph 7.30(d)(6) requires that decisions as to the admissibility of evidence or testimony be made under the Federal Rules of Evidence.

Section 7.31 Examiner's decision.

Paragraphs 7.31 (a) and (b) require that the examiner make a determination no later than 15 days after the close of the hearing, that the determination be made exclusively on matters of record in the proceeding, and that the determination set forth all findings of fact and conclusions of law relevant to the matter at issue. These paragraphs are taken from 5 CFR 737.27(a)(8)(i).

Paragraph 7.31(c) requires that the examiner provide copies of his or her determination to the complainant, the former employee, the Ethics Officer and the Commission. The complainant has been added as a recipient since publication of the Notice of Proposed Rulemaking for the sake of consistency with § 7.23(b)(3) which provides that the complainant is to receive notification if the Commission decides that a complaint is unfounded and that no investigation is to be conducted, and with § 7.25(c) which provides that the complainant is to receive notification and a statement of reasons if the Commission finds no reasonable cause to believe a violation has occurred.

Section 7.32 Appeal.

This section establishes the rights of the former employee and of the Ethics Officer to appeal a decision of the hearing examiner to the Commission, sets out the procedures to be followed by the appealing party in filing a notice of appeal, and specifies the powers and responsibilities of the Commission in reviewing the examiner's decision and in reaching its own determination.

Paragraph 7.32(a) permits either the former employee or the Ethics Officer to appeal the decision of the hearing examiner to the Commission by filing a notice of appeal with the Chairman within 10 days of receipt of the decision. This paragraph is based on 5 CFR 737.27(a)(8)(ii).

Paragraph 7.32(b) requires that the notice of appeal be accompanied by a memorandum setting forth the legal and factual reasons why the examiner's decision should be reversed or modified.

Under Paragraph 7.32(c) the Commission may affirm, modify or reverse the examiner's decision. This decision is to be based solely on the hearing record or on those parts of the record cited by the parties in order to limit the issues on appeal. This paragraph is based in part on 5 CFR 737.27(a)(8)(ii).

Pursuant to § 7.32(d), if the Commission decides to modify or reverse the examiner's decision, it must specify those findings of fact or conclusions of law which differ from those of the examiner. This paragraph is based in part on 5 CFR 737.27(a)(8)(iii).

Section 7.33 Administrative sanctions.

This section sets out the authority of the Commission to take appropriate disciplinary action in the case of any individual found to have violated 18 U.S.C. 207 (a), (b) or (c), whether after a final administrative hearing or, if no hearing is held, after adequate notice to the former employee involved. Examples of such appropriate actions are given, including general prohibitions against appearing before the Commission for a period not to exceed five years, letters of reprimand, letters of admonishment, or prohibitions against making appearances in particular matters or on behalf of a particular party. This section is based on 5 CFR 737.27(a)(9).